FORTUNE MURISI
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & MAVANGIRA JJ
HARARE, 6 February 2013

Criminal Appeal

No appearance for the appellant
M Mugabe, for the respondent

HUNGWE J: The appellant was a magistrate stationed at Chinhoyi Provincial Magistrates Court, Mashonaland West. He was arraigned in that court on two counts of contravening s 3(1) (a) (ii) of the Prevention of Corruption Act, [*Cap 9*:*16*] and, after a contested trial, convicted. He was, on 3 April 2006, sentenced to undergo thirty six months imprisonment of which twelve months were suspended on condition of future good behavior. He was represented by counsel of his choice throughout his trial. After sentence was pronounced, he noted an appeal against both conviction and sentence on 11 April 2006. Advocate *Matinenga* prepared appellant's heads of argument which were filed on 28 February 2008. The respondent's heads of argument were filed on 30 May 2008. The reason for the delay appears to be related to problems which besotted the courts around that time regarding stationary and equipment. (The record reflects that the legal practitioners offered to assist with bond paper). There is no explanation as to what transpired between 2008 and 2011 but there is a certificate by the parties certifying, in April 2012, that the record was an accurate transcript of the original record of trial proceedings. On the date set for the appeal hearing, 13 November 2012, Advocate *Uriri* appeared for the appellant. He applied for the postponement of the matter, and by consent, the matter was postponed to 20 November 2012. On that date however, there was no appearance by the appellant or his counsel. Counsel for the State, Mr *Mugabe*, moved for the dismissal of the matter on the merits as the matter was long outstanding on the roll. We agree with him. He

presented argument for the respondent. After hearing Mr *Mugabe,* for the State, we dismissed the appeal on the turn and indicated our reasons will follow later. These are the reasons.

The first issue that exercised our minds was whether, in light of non-appearance by the appellant, we could still proceed to hear argument from the respondent and decide the matter on the merits. In *Matamisa* v *Mutare City Council* (A-G intervening) 1998 (2) ZLR 439 (S) the Supreme Court expressed itself, when faced with a similar situation, as follows:

> "The comments of the Attorney-General about the nature of a hearing at the Supreme Court are, in my view, correct. An appeal is not a trial. It is not necessary to go over everything at the appeal hearing. Heads of argument are submitted, among other reasons, to shorten oral argument. The court will almost certainly have read these before the hearing. If so, it may consider that it is not necessary to waste its and counsel's time while counsel simply reads out what he has already put in writing. Sometimes the court may ask counsel to deal only with particular points. It may advise counsel that it does not want to hear him at all, because its *prima facie* view is that counsel's argument is correct, and will ask the other side to present his argument in full.
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> All this is part of the way this court and other courts of appeal elsewhere in the world have always conducted their proceedings." (per EBRAHIM JA @ p444E-G).

In my respectful view, these sentiments apply with equal force in appeals before this court. In *casu*, both the appellant and the respondent were represented through counsel when the matter was by mutual consent postponed to a specific date and time at the request of the appellant. Yet there is no explanation for non-appearance by the appellant on the day of hearing. The respondent, in my respectful view, is correct in urging this court to hear and dispose of the matter on the merits. The matter cannot simply be struck off the roll. This, in my view, is inconsistent with the requirement to treat all appeals generally as urgent matters. In any event, having formed our *prima facie* view of the matters raised in this appeal, a determination on the merits will move the matter to the next step and bring it to finality sooner rather than later.

Rule 4 of the Supreme Court (Magistrates Court) (Criminal Appeals) Rules, Statutory Instrument 504 of 1979, provide:

> "The prosecution and finalization of all appeals in terms of these rules, especially any appeal, other than an appeal by the Attorney-General in terms of paragraph (a) of s 61 of [*Cap 7*:*10*], relating to a case in which the convicted person has received an unsuspended prison sentence, shall be treated by all persons concerned as a matter of urgency."

Appeals in the High Court are governed by s 38 of the High Court Act, [*Cap 7*:*06*]. Section 38 of that Act provides, in respect of appeals;

38 Determination of appeals in ordinary cases

(1) Subject to this section and section *thirty-nine*, on an appeal against conviction the High Court shall allow the appeal and quash the conviction if it thinks that the judgment of the court or tribunal before which the appellant was convicted should be set aside—
(*a*) on the ground that—
(i) it is unreasonable; or
(ii) it is not justified, having regard to the evidence; or
(*b*) on the ground of a wrong decision on any question of law; or
(*c*) because on any other ground there was a miscarriage of justice;
and in any other case shall dismiss the appeal.

Therefore unless, upon a reading of the record of the trial proceedings and the heads of argument filed by the parties, the court is of the opinion that an appeal has merit on the basis of one or more of the matters set out in that section, it shall dismiss the appeal. There is no express requirement for oral argument to be presented before the court could exercise its appeal powers.

Although there are three grounds of appeal put forward by the appellant, the heads of argument relied upon by counsel took only one point. It is that the State had not proved all the essential elements of the offence and as such the presumption provided in s 15(2) of the Prevention of Corruption Act, [*Cap 9*:*16*] could not be lawfully be invoked in favour of the State.

In a carefully reasoned judgment, the Provincial Magistrate, who presided over the trial in the court a *quo*, found the following facts to have been established by the evidence adduced before him. At p 8 of the judgment he said:

> "In count 1, the court carefully analysed the evidence of all State witnesses and found it highly improbable that these witnesses who came from different backgrounds met and fabricated their evidence. Sarah and Agnes saw accused in his office. They spoke to him. They saw him holding a red pen and with it he marked some items on exh 1 which Sarah was supposed to get even before the matter was finalized. With the same red pen, Agnes was given a piece of paper which had two of the accused's phone numbers. The same numbers were used by Agnes and they connected her to the accused and in the presence of Sarah. Sarah and Agnes saw accused use a red pen to mark exh 1. These two heard accused promise that Sarah should be able to get the items marked even before the matter was finalized."

It should be recalled that the witness Simon Kasukuwere, a prison officer, had deposed to being sent by the appellant to collect money from someone at Greens. He did not know the person who was to give him money on the appellant's behalf nor the amount to be given let alone the reason why the appellant was to be given money by this person. He had deferred to the appellant's instruction as he considered his rank subordinate to that of the appellant. Regarding Simon, Agnes and Sarah, the magistrate said:

> "They all said the accused received $500 000-00 from Sarah. Sarah and Agnes fully corroborated each other in all material respects. They visited the accused's office and had a discussion with him. They were told that lunch should be bought if Sarah's case was to be heard on the 29th of December. Indeed, on that day the matter was not postponed as feared but it was heard before the accused and Sarah got the relief she had prayed for."

The appellant contends that Agnes and Sarah never sought to corrupt the appellant. Reliance is placed on a few lines (3 lines on p 13; 3 lines on p 65 and 10 lines on p 79) for this contention. What appears at p 13 reflects events leading to the arrest of the appellant well after the offence had been committed. At p 65 Agnes simply repeats the demands for lunch by the appellant which she did not realize was an offence yet the payment was meant to induce the appellant to show favour in the execution of his official duties. Page 79 deals with amounts which do not form part of count one for which appellant was convicted. He was acquitted on count 2 to which these amounts relate. The evidence on which the appellant was convicted clearly shows, as the learned magistrate demonstrated, that it is the solicitation by the appellant for money for lunch which form the basis for drawing an inference in terms of s15 (2) of the Prevention of Corruption Act, that this request, if acceded to, would result in the appellant showing favour towards the treatment of her case on 29 December. Indeed ZW$500 000-00 was paid to the appellant through Simon and on 29 December, by Sarah Rice, who only partially obtained access to some items which were under legal contestation at court in a matter presided over by the appellant.

Counsel for the appellant in his heads of argument urged this court to find that the State had not proved all the essential elements of the offence charged. He relied on *S* v *Chogugudza* 1996 (1) ZLR 28 (S) where the following appears at p30 E-F):

> "… before the State could rely on the presumption in s 15 (2) of the Prevention of Corruption Act, it would have to show:
> (a) that the accused was a public officer;
> (b) that in the course of his employment or in breach of his duty;
> (c) he did something which, objectively considered, showed favour or disfavour to another."

The interpretation which the appellant gave to s 3(1)(a) of the Act is not supportable on the facts. Counsel correctly points out that the above passage was stated in the context of s 4 of the Act. It must be accepted that there is a clear distinction between the two sections. Whilst s 3(1) sets out what constitutes corrupt practices, s 4 is concerned with offences by public officials. As such there is no need to import some interpretation when the literal interpretation gives effect to the clear intention of the legislature.

In the absence of ambiguity it must be taken to mean what it says and say what it means. There is simply no basis for reading anything into the words employed or for putting a particular gloss on a meaning so plain and patent.

> "The rule of construction is 'to intend the Legislature to have meant what they have actually expressed'. The object of all interpretation is to discover the intention of Parliament; 'but the intention of Parliament must be deduced from the language used', for 'it is well accepted that the beliefs and assumptions of those who frame Acts of Parliament cannot make the law'.
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> Where the language is plain and admits of but one meaning, the task of interpretation can hardly be said to arise . . ."

See Maxwell on Interpretation of Statutes 12 ed at p 28, quoted by BEADLE CJ in *S* v *Takaendesa* 1972(4) SA 72 (RA) at 75 G; 1972(1) RLR 325(A) at 332 E-F.

Section 3(1)(a)(ii) provides:

> **3. Corrupt Practices**
>
> (1) If----
> (a) any agent corruptly solicits or accepts or obtains, or agrees to accept or attempts to obtain, from any person a gift or consideration for himself or any other person, as an inducement or reward-
> (i) for doing or not doing, or for having done or not done, any act in relation to his principal's affairs or business; or

(ii) for showing or not showing, or for having shown or not shown, favour or disfavor to any person or thing in relation to his principal's affairs or business:

(b) …

…

(f) …

he shall be guilty of an offence.

Section 15 (2) (a) then says;

If it is proved in any prosecution for an offence in terms of section *three* or *four* that:-

(a) Any agent has solicited, accepted, obtained, agreed to accept, or attempted to obtain any gift or consideration for himself or for any other person, it shall be presumed, unless the contrary is proved, that the agent did so in contravention of section *three*…

Counsel's argument suggests that for conviction to follow, the appellant ought to have done something which, objectively considered, showed favour or disfavour to another, in this case to Sarah. I disagree. As would be seen from s 3(1) above, what constitutes the offence in terms of s 3 (1) (a) (ii) is soliciting, accepting or agreeing to accept or attempting to obtain, from any person a gift or consideration for himself or any other person as an inducement or reward, for showing or not showing or for having shown or not shown, favour or disfavor to any person in relation to his principal's affairs or business. What is punished is what is set out in that section. In my respectful view the learned trial magistrate, having correctly found that the appellant solicited for money for "lunch" which money was subsequently paid by Sarah through Simon whom the appellant had sent, cannot be faulted for convicting the appellant. The proved facts show that the appellant was approached by Agnes and Sarah after the clerk of court indicated that the matter may not be heard early. In the discussions that took place in his office he had made certain undertakings. He has also indicated to the two women that he will need money for "lunch". Subsequent to this he had sent Simon to collect a "parcel" from the ladies one of whom had a matter pending in his court. Simon was given ZW$500 000- 00 which he passed on to the appellant. In these circumstances I find no merit in the argument advanced on the appellant's behalf. I therefore dismiss the appeal against conviction. There is no appeal against sentence. Nothing further needs be said. The following order is therefore made.

"The appeal against conviction be and is hereby dismissed."

MAVANGIRA J: agrees

Muchineripi & Associates, appellant's legal practitioners
Attorney General's *Office*, respondent's legal practitioners